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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1946

No. 632

TRIUMPH EXPLOSIVES, INC., formerly known as and sued herein as TRIUMPH FUSEE & FIREWORKS COMPANY, LTD. (a Maryland corporation),

Petitioner,

vs.

OSCAR GIUSTI,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Triumph Explosives, Inc., a Maryland corporation, hereinafter referred to throughout

as "Triumph," defendant and appellee below, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the decision of said Court rendered the 27th day of June, 1946.

The opinion sought to be reviewed is Oscar Giusti, appellant, v. Pyrotechnic Industries, Inc., a corporation, et al., appellees, in the record herein. (R. 105.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Circuit Court of Appeals has reversed the order of the District Court of the United States, in and for the Northern District of California, Southern Division, dismissing a complaint as to Triumph and quashing a service of summons on the Secretary of State of the State of California as the claimed agent of Triumph.

Respondent, as plaintiff, brought an action in the District Court of the United States, in and for the Northern District of California, Southern Division, for treble damages in the sum of $150,000.00, for punitive damages in the further additional sum of $150,000.00, for costs of suit, and for 20% of the amount of the damages as counsel fees. The complaint was filed November 13, 1944; it alleges that the action arises under the Federal Trade Commission Act, the Clayton Act, and the Robinson-Patman Act.

Each of the defendants, except those sued by a fictitious name, is a corporation. Their names and state of incorporation are as follows:

Name	State
Pyrotechnic Industries, Inc.	Delaware
Unexcelled Manufacturing Company, Inc.	New York
National Fireworks, Inc.	Massachusetts
National Fireworks Distributing Company	Arizona
Los Angeles Fireworks Company, Ltd.	California
Victory Fireworks & Specialty Company	Maryland
Triumph, sued as Triumph Fusee & Fireworks Company	Maryland
M. Backes' Sons, Inc.	Connecticut
Essex Specialty Company, Inc.	New Jersey

The statement in the second paragraph of the opinion (R. 106) that

> "Triumph, a Delaware corporation, is an association of fireworks manufacturing corporations composed of the other defendants below, a New York, Arizona, Massachusetts, Connecticut, New Jersey, two Maryland, and several California corporations, producing approximately 85% of the total production of fireworks in the United States,"

is completely erroneous. The complaint actually alleges as follows in respect to Triumph: "The defendant, Triumph Fusee & Fireworks Company, is a corporation organized, existing and doing business by virtue of the laws of the State of Maryland; it is engaged in the manufacture and sale of fireworks." (R. 4.) The complaint further alleges:

> "Defendants Unexcelled Manufacturing Company, Inc., Triumph Fusee & Fireworks Company, M. Backes' Sons, Inc., Essex Specialty Company, Inc., and National Fireworks Distributing Company, Los Angeles Fireworks Company, Ltd., and the Victory Fireworks & Specialty

> Company, compose the entire membership of defendant *Pyrotechnic Industries, Inc.*, and produces approximately eighty-five per cent (85%) of the total production of commercial fireworks in the United States."

The complaint alleges, as above quoted, that the defendants sued by their true names organized Pyrotechnic Industries, Inc., and on or about the 12th day of April, 1935, and acting through and by means of the last named defendant, entered into undertakings, agreements, combinations and conspiracies for the purpose of unlawfully restricting, restraining, monopolizing, suppressing and eliminating competition in the manufacture, jobbing and retail sales of fireworks in trade and commerce between, among, in and with the several states of the United States; that pursuant to said understandings, agreements, combinations and conspiracies of the defendants, and in furtherance of them, the defendants, between January 15, 1936, and January 1, 1938, performed certain acts and things listed in the complaint (R. 7, 8, 9), namely:

> "(a) Agreed to fix and maintain, and have fixed and maintained, uniform prices in the sale of fireworks to jobbers of fireworks in the United States to the particular grave damage and detriment of the plaintiff.
>
> "(b) Agreed to fix and maintain and have fixed and maintained, uniform discounts in the sale of fireworks by manufacturers to jobbers of fireworks in the United States to the particular grave damage and detriment of the plaintiff.

"(c) Agreed to fix and maintain, and have fixed and maintained uniform prices and discounts at which jobbers of fireworks should sell to retailers in the United States to the particular grave damage and detriment of the plaintiff.

"(d) Agreed to designate, and have so designated, what concerns or individuals should and/or should not be sold by manufacturers of fireworks as jobbers to the particular grave damage and detriment of the plaintiff.

"(e) Organized and held meetings of groups of fireworks jobbers in various parts of the United States according to the particular subdivisions of the United States in which they were situated, to devise means of asserting influence, pressure, coercion, and other means of inducing, requiring and coercing these fireworks jobbers to abide by and adhere to the agreements, combinations and conspiracies of the defendants to the particular grave damage of the plaintiff;

"(f) Procured promises and agreements from various jobbers of fireworks in the United States pursuant to those acts alleged in paragraph (e), as above, to the particular grave damage and detriment of the plaintiff.

"(g) Maintained the continuance of all those acts mentioned in paragraphs (a), (b), (c), (d), (e) and (f), as above, by diverse methods of policing manufacturers, jobbers, and retailers of fireworks in the United States, to the particular grave damage and detriment of the plaintiff.

"(h) Agreed to compile and maintain lists, and have compiled and maintained lists of those concerns which should be, and are, recognized as

chain stores which are allowed certain special discounts from the defendants in addition to those granted other purchasers to the particular grave damage and detriment of the plaintiff.

"(i) Agreed to fix and maintain and have fixed and maintained minimum retail prices of fireworks throughout the United States to the particular grave damage and detriment of the plaintiff.

"(j) Agreed to refuse to sell, and have refused to sell, fireworks to certain concerns, thus boycotting said concerns and cutting off or seriously impairing their supply of fireworks."

It is further alleged that on or about January 15, 1936, said defendants, pursuant to said agreements, combinations and conspiracies, caused to be organized an association of certain of the defendants (of which Triumph was not one) which had Pacific Coast establishments, known as the Pacific Coast Fireworks Distributing Association, which held meetings at San Francisco between January 15, 1936, and January 30, 1936;

"that at one of said meetings the association adopted a resolution wherein it was resolved that the association contact all eastern manufacturers of fireworks, for the purpose of preventing any further sale of fireworks to plaintiff or his agent; that within six months thereafter, as plaintiff is informed and believes and accordingly alleges, said association had contacted not only such eastern manufacturers, but also all fireworks manufacturers in the United States, and had requested that plaintiff be blacklisted by each of them; that

> at all times thereafter, plaintiff * * * was unable to purchase any fireworks for his said business, all to plaintiff's damage in the sum of Fifty Thousand Dollars ($50,000.00)."

To preserve against the running of the Statute of Limitations, the plaintiff alleged that he became insane on January 13, 1936, and that he was insane until his recovery from the disability on or about January 8, 1943, at which time he was discharged.

On December 8, 1944, a purported service of summons and complaint in said action on Triumph was made by the plaintiff upon the Secretary of State of the State of California.

On April 13, 1939, plaintiff filed an action almost identical with the one above outlined in the United States District Court in San Francisco against the same defendants above listed, including petitioner. The only defendant then served in said action, Pyrotechnic Industries, Inc., made a motion to quash service of summons which was granted November 22, 1939. Later, on May 20, 1940, although a second defendant, Los Angeles Fireworks Company, Ltd., was thereafter served on December 29, 1939, at the request of respondent, the action was dismissed without prejudice as to all defendants, including this petitioner.

In the present case, of all of the defendants sued, the only defendant upon whom service of summons and complaint was attempted to be made was Triumph. Following the purported service of summons

on the Secretary of State of California, Triumph gave "notice of special appearance only and motion to quash summons and service thereon only," accompanying the motion by affidavit. Contra to the motion, respondent and his counsel each filed an affidavit. Further affidavits were filed on behalf of Triumph, namely, affidavits of James M. Heppenstall, Mary V. Bell and Roy R. Trempy. Oral evidence was introduced.

On June 19, 1945, the District Court granted petitioner's motion to quash service of summons and dismissed the complaint. (R. 88.) This order was appealed by respondent. On June 27, 1946, the United States Circuit Court of Appeals for the Ninth Circuit reversed the order of the trial Court. Triumph, appellee in the Court below, petitioned for a rehearing. This petition was denied on August 27, 1946.

It abundantly appears in the record, and without conflict, that Triumph is a corporation organized and existing under and by virtue of the laws of the State of Maryland. (R. 4.) The conspiracy, if any existed, commenced in 1935 and terminated some time prior to December, 1938. During this period Triumph neither resided in nor was found nor had an agent in the State of California (Title 15, Section 15, U.S.C.A.), nor was it an inhabitant of, found in or transacting business in the State of California. (Title 15, Section 22, U.S.C.A.) Some time after the termination of the conspiracy and on or about May 1, 1939, Triumph established a warehouse and was in the State of California and transacted business in the State of

California. On January 2, 1940 (R. 17), Triumph qualified to do business in the State of California and filed a certificate designating an agent for the service of process; that on or about July 1, 1942, Triumph had completely ceased to do business in the State of California. (R. 34.) On December 7, 1943, Triumph filed in the office of the Secretary of State of California its certificate of withdrawal from intrastate business in California in the form prescribed in Section 411 of the Civil Code of California (R. 18) and has not since said time transacted business, intrastate or otherwise, in the State of California. (R. 18.) The certificate states, among other matters, "That said defendant consents that process against it in any action upon any liability or obligation incurred within this State prior to the filing of the Certificate of Withdrawal may be served upon the Secretary of State."

During the period between May 1, 1939, and December 7, 1943, Triumph did not have, nor is it claimed that it did have any business relations with respondent nor that any conspiracy existed during that time.

QUESTIONS PRESENTED.

Triumph, petitioner here, presents to this Court the sole question of whether the Circuit Court was in error in failing to affirm that part of the order of the District Court quashing service of summons.

In stating this proposition the question of law here presented may, as to Triumph, be succinctly stated as follows:

Did a Maryland corporation which at the time of a purported service of summons was not a resident of the State of California and was not in said State engaged in or transacting business in any shape, manner or form, directly or indirectly, subject itself to the jurisdiction of a District Court in California when process was attempted to be served upon it over a year after it had legally withdrawn from doing business in the State of California on a cause of action based upon a conspiracy to violate the anti-trust laws which is alleged to have existed long before the defendant corporation was engaged in business in the State of California?

The questions of law here presented having general application may be succinctly stated as follows:

(A) Is a member of a conspiracy, actually not present in a state, directly or indirectly, transacting business within the meaning of that term as used in applicable Federal and State statutes in a state where a coconspirator is alleged to have engaged in a series of actions for the purpose of blacklisting a plaintiff?

(B) Is a co-conspirator in a claimed anti-trust violation an agent of a foreign corporation within the meaning of applicable Federal statutes relating to venue in actions arising under the Clayton Act?

There is the further question here involved of whether under the California law the agency of the

Secretary of State is confined to suits upon liabilities created by Triumph upon business transacted by it in California.

JURISDICTION.

Petitioner invokes the jurisdiction of the Court under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. (Title 28, Section 347, U.S.C.)

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

A.

Certiorari should be granted because of the importance of the problem in the administration of the anti-trust laws.

Writ of certiorari granted in *Smith v. Hoboken R. R. Warehouse and S. S. Connecting Co., et al.,* 66 Supreme Court Reporter 949, ... U. S. ....., because of the importance of the problem in the administration of the interstate commerce act and the bankruptcy act.

Writ of certiorari granted in *Hannegan v. Esquire, Inc.,* 327 U. S. 146, because of the importance of the problem in the administration of the postal law.

B.

The Circuit Court of Appeals has decided a federal question, namely, what constitutes transacting busi-

ness in a district in such a sense as to establish venue of a suit in a district and to confer jurisdiction over a defendant in a way probably in conflict with applicable decisions of this Court in the following cases:

Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405;

Louisville & Nashville Railroad Co. v. Chatters, 279 U. S. 320;

Eastman Kodak Co. v. Southern Photo Materials Co. (1927), 273 U. S. 359;

Missouri Pacific Railroad Co. v. Clarendon Boat Oar Co., 257 U. S. 533;

Robert Mitchell Furniture Co. v. Selden Breck Construction Co., 257 U. S. 213;

People's Tobacco Co., Ltd. v. American Tobacco Co. (1918), 246 U. S. 79;

Simon v. Southern Railway Co., 236 U. S. 115;

Old Wayne Mutual Life Association v. McDonough, 204 U. S. 8.

C.

The Circuit Court of Appeals has decided a federal question, namely, what constitutes an agent within the meaning of the Clayton Act in a way probably in conflict with the applicable decisions of this Court in the following cases:

Eastman Kodak Co. v. Southern Photo Materials Co. (1927), 273 U. S. 359;

Lumiere v. Mae Edna Wilder, Inc. (1923), 261 U. S. 174, 178.

D.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, namely: Do acts of an alleged co-conspirator of a defendant corporation within a district constitute *transacting business* within that district within the meaning of the Clayton Act so as to establish venue of a suit against and to confer jurisdiction over a defendant corporation in that district although the defendant corporation did not reside in the district, was not an inhabitant thereof, and otherwise could not be said to be found or have an agent or to transact business therein?

This question has been determined in the affirmative by the United States Circuit Court of Appeals in the instant case, which Triumph alleges is erroneous. It has been determined in the negative by the District Courts of New Jersey and New York in the following cases:

Mebco Realty Holding Co. v. Warner Bros. Pictures (D.N.J., 1942), 45 F. Supp. 340;

Westor Theatres v. Warner Bros. Pictures Inc. (D.N.J., 1941), 41 F. Supp. 757, 760;

Hansen Packing Co. v. Armour & Co. (S.D. N.Y., 1936), 16 F. Supp. 784, 787.

E.

The Circuit Court has decided an important question of California law in a way probably in conflict

with local California decisions in respect to the meaning of the term "transacting business." The decision of the Circuit Court of what the California Legislature meant by "transacting business" is directly opposed to the definition contained in Section 405 of the Civil Code as follows:

> "The term 'transact intrastate business' as used in this chapter means entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce."

and contrary to the decisions of the Supreme Court and the District Courts of Appeal of the State of California in the following cases:

Estate of Wellings (1923), 192 Cal. 506, 513;

Davenport v. Superior Court (1920), 183 Cal. 506;

Conference Free Baptists v. Berkey (1909), 156 Cal. 466, 470;

The Thew Shovel Co. v. Superior Court (1939), 35 C. A. (2d) 183, 185;

McMillan Process Co. v. Brown (1939), 33 C. A. (2d) 279, 284, 91 P. (2d) 613;

Milbank v. Standard Motor Const. Co. (1933), 132 Cal. App. 67, 70;

W. W. Kimball Co. v. Read (1919), 43 Cal. App. 342, 345.

Additional applicable California statutes are set forth in an appendix attached to the accompanying brief.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 11,189, Oscar Giusti, Appellant, v. Pyrotechnic Industries, Inc., a corporation, et al., appellees, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as may be proper.

Dated, San Francisco, California,
October 18, 1946.

HAROLD C. FAULKNER,
ROBERT BEALE,
Attorneys for Petitioner.

GREGORY, HUNT, MELVIN & FAULKNER,
Of Counsel for Petitioner.

Certificate of Counsel

I hereby certify that I am one of the petitioner's attorneys in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
October 18, 1946.

Harold C. Faulkner,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

October Term, 1946

No.

Triumph Explosives, Inc., formerly known as and sued herein as Triumph Fusee & Fireworks Company, Ltd. (a Maryland corporation),

Petitioner,

vs.

Oscar Giusti,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals, rendered June 27, 1946, is set forth in full in the record (R. 105) and is reported under the same title in ..... Fed. (2d) .....

II.

JURISDICTION.

Petitioner adopts the reasons stated in the petition for writ of certiorari (p. 11 hereof) as supporting the jurisdiction of this Court.

III.

STATEMENT OF THE CASE.

Petitioner adopts the "Summary Statement of the Matter Involved", appearing in the petition for writ of certiorari (pp. 2-9 hereof) as a statement of the case, for the purpose of this brief.

IV.

SPECIFICATIONS OF ERROR.

I.

The Circuit Court of Appeals erred in holding that Triumph transacted business in California within the meaning of Sections 405, 406a and 411(2) of the Civil Code of California. (R. 114.)

II.

The Circuit Court of Appeals erred in holding that the acts of an alleged co-conspirator of Triumph within the Northern District of California constituted transacting business within that district within the meaning of the Clayton Act so as to establish venue

of a suit against and to confer jurisdiction over Triumph in that district although it did not reside in the district, was not an inhabitant thereof and otherwise could not be said to be found or have an agent or to transact business therein. (R. 113.)

III.

The Circuit Court of Appeals erred in holding that Triumph transacted business in the Northern District of California in such a sense as to establish venue and to confer jurisdiction over Triumph. (R. 112.)

IV.

The Circuit Court of Appeals erred in holding that the alleged co-conspirators of Triumph were its agents within the meaning of the Clayton Act. (R. 114.)

V.

ARGUMENT.

INTRODUCTION.

The decision of the Circuit Court is the first decision of its kind. It constitutes a wide departure from rather well defined and well settled rules of determining whether a foreign corporation is subject to the jurisdiction of a particular district. There can be no question that at the time of the service of process Triumph was not a resident of California. (It was a resident of Maryland only.) It was not found in California and it did not have an agent in California. The interpretation of the phrase "transacting busi-

ness" and of the word "agency" constitutes a radical departure from all authority, both Federal and State of California. The theory that "transacting business" can be established by the allegation of a conspiracy has been repudiated on four occasions. The United States District Court for the Northern District of California in the present case; the United States District Court for the District of New Jersey on two occasions has repudiated this theory, and the United States District Court for the Southern District of New York has likewise repudiated this theory. The interpretation of the word "agent" as used in the Clayton Act to embrace any member of a conspiracy is contrary to the meaning of the word as used in the statute and is likewise opposed to the requirements of what constitutes an agent within the meaning of the statute as interpreted by the Federal Courts.

Our argument here will consist of a discussion of questions referred to under the title "Questions Presented" in the petition (pp. 9-11 hereof) prefaced by a discussion of applicable California statutes, and the treatment under Subdivision A hereof of the importance of the problem in the administration of the anti-trust laws, and then will follow in chronological order a discussion of the foregoing specifications of error.

Sections 15 and 22 of Title 15 USCA and of certain California statutes are set forth in an appendix hereto.

California, in conformity with the policy which is generally uniform throughout the United States, has

provided for the method by which a foreign corporation may engage in business in the State of California. It likewise provides for the method by which a corporation, which has at one time been engaged in business in the State of California, may withdraw therefrom. It likewise provides for the mode of serving process upon foreign corporations in certain instances. Section 411 of the Civil Code of California provides, among other things, as to withdrawing corporations as follows:

> "That it consents that process against it in any action upon any liability or obligation incurred within this State prior to the filing of the certificate of withdrawal may be served upon the Secretary of State." (Appendix, infra.)

It is quite clear that under this language the only consent given by the withdrawing corporation is that process may be served in an action upon a liability or obligation incurred within this State.

Section 406a of the Civil Code, a part of Chapter 16 dealing with foreign corporations and a companion section to 411, provides as follows:

> "Corporations that have withdrawn. A foreign corporation which has transacted intrastate business in this State and has thereafter withdrawn from business in this State may be served with process in the manner provided in this section in any action brought in this State arising out of such business, whether or not it has ever complied with the requirements of Section 405, Civil Code." (Civil Code, Section 406a.)

Section 405, defining the use of terms used in Chapter 16, of which Sections 411 and 406a are a part, defines the term "transacting intrastate business" as follows:

> "The term 'transact intrastate business' as used in this chapter means entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce."

Although the Circuit Court of Appeals stated that it did not agree

> "* * * that under the California law the Secretary of State's agency is confined to suits upon liabilities created by Triumph only in 'business transacted' by it in that State; * * *" (R. 110.)

and also stated that

> "It is strongly arguable that 406a is not a limitation on the general term 'liability' of Section 411.2."

it, nevertheless, decides the case upon the assumption that it is a limitation. (R. 112.)

Sections 405, 406a and 411 were all enacted for the purpose of regulating foreign corporations engaged in business in the State of California. They were enacted pursuant to the exercise of the police power of the State and, under California law, must be construed together.

See:

Tucker v. Cave Springs Mining Corporation (1934), 139 C. A. 213, 33 Pac. (2d) 871,

where the Court said, at page 217:

> "It must be borne in mind that the entire statute thus regulating corporations and individuals is but an expression and exercise of the police power of the state (Perkins Mfg. Co. v. Clinton Construction Co., 211 Cal. 228, 295 Pac. 1, 75 A.L.R. 439), and must therefore be construed as a whole."

The history of the enactment of these sections demonstrates the express intent of the legislature to confine suits to intrastate business.

Section 411 was added to the Civil Code in 1929 as a new section. (Stats. 1929, p. 1290.) It was superseded by the General Corporation Law in 1931 (Stats. p. 1762) and then again added to the Code by Stats. 1931, p. 1834. The last paragraph of Section 406a was not in existence at that time but was later added by Stats. 1933, Chapter 533, apparently in order to provide a method of serving process where none was provided by Section 411.

The liability sued on must be one incurred within the State, and it must arise out of the intrastate business previously transacted within the State.

The consent which Triumph gave to the service of process upon it in conformity with Section 411(2) of the Civil Code obviously referred to a legal service of process as required by the last paragraph of 406a, supra.

The mere reading of the applicable sections of the California law shows beyond cavil that a withdrawing corporation consents only to the service of process upon it which would be legally served under the laws

of Californ , and under the laws of California the service may be made only upon a foreign corporation which has transacted intrastate business in this State and has thereafter withdrawn, and the action must be one brought in the State and arising out of such business, i.e., transacted intrastate business.

The intrastate business referred to is defined in Section 405 of the Civil Code of California:

> "The term 'transact intrastate business' as used in this chapter means entering into repeated and successive transactions of its business in this State, other than interstate or foreign commerce."

In addition to the question of the intrastate source of the liability, there also arise questions of when and where the liability of Triumph in the instant case was incurred and, specifically, whether or not it was ever incurred in California. At the time this conspiracy was in existence, 1935-38, Triumph was a resident of Maryland; it had not transacted business in California, as that term has generally been interpreted by the Courts, and it was not found there. It would appear, therefore, that liability under the Clayton Act could only have been incurred in the state of residence of Triumph, or in a place or in a district where Triumph could have been sued under the provisions of the Clayton Act.

Druckerman v. Harbord (1940), 174 Misc. 1077, 22 N.Y.S. (2d) 595.

Any liability of Triumph in responding in damages to the appellant for the cause of action set forth in

the complaint was founded upon facts and transactions occurring prior to the time when Triumph entered the State of California to do business. It is respectfully submitted that when Triumph entered the State of California in 1939 to do business, as hereinbefore outlined, then, and only then, did it surrender itself to the jurisdiction of the State of California, to be sued only upon obligations arising out of its intrastate business in California, and that it did not subject itself to the jurisdiction of the California courts to be sued upon obligations which it may have incurred at a time before it qualified to do, or did, business in the State of California within the meaning of the law.

In this connection it should be noted that this Court has consistently rejected attempts to so interpret state statutes as to find consent to suits arising, not only out of activities conducted in the state, but also those arising out of activities conducted out of the state, unless such broad construction is required by the express language of the statute.

Morris & Co. v. Skandinavia Insurance Co., 279 U. S. 405;

Simon v. Southern R. Co. (1915), 236 U. S. 115;

Old Wayne Mutual Life Asso. v. McDonough (1907), 204 U. S. 8.

It is clear that California in the enactment of Sections 411 and 406a did not intend to require and did not in fact obtain consent to suits upon any obligations, save and except those arising from the repeated

and successive transactions of regular business within the State within the period a corporation was privileged by the State to so conduct such transactions.

Chipman, Limited v. Thomas B. Jeffery Co., (1920), 251 U. S. 373;

Hunter v. Mutual Reserve L. Ins. Co. (1910), 218 U. S. 573.

A.

CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF THE PROBLEM IN THE ADMINISTRATION OF THE ANTI-TRUST LAWS.

Prosecutions and actions relating to the anti-trust laws have in recent years assumed large proportions.

Honorable Tom C. Clark, Attorney General of the United States, in an address to the San Francisco Bar Association, as late as October 2, 1946, declared as his policy the vigorous prosecution of all violations of the anti-trust laws. These prosecutions often result in civil actions. The venue of these actions has always been determined up to now upon the basis of whether the corporation defendant was transacting business in the usual sense. We now have a holding:

> "The California members of the conspiracy were agents of Triumph in the conspiracy's attempt to destroy appellant's business. Triumph was in California acting through such agents just as it would have been if it had employed a group of agents there continuously to underbid on sales to appellant's customers." (Opinion, Circuit Court, R. 114.)

The decision goes further and directly repudiates the holding in *Westor Theatres v. Warner Bros.*, 41 Federal Sup. 757. Under this holding a simple complaint charging a continuing conspiracy under the anti-trust laws would permit the plaintiff to secure jurisdiction over any party member of the conspiracy wherever resident merely by serving a resident of the district with process on the theory that it is a co-conspirator and thus the agent of all defendants sued.

The importance of the problem in relation to the administration of the anti-trust laws becomes apparent without further discussion or illustration of the manner in which this holding might be applied in the great mass of pending civil anti-trust actions and anti-trust actions in the future.

B.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT TRIUMPH TRANSACTED BUSINESS IN CALIFORNIA WITHIN THE MEANING OF SECTIONS 405, 406a AND 411 (2) OF THE CIVIL CODE OF CALIFORNIA.

There is no evidence in this record showing that Triumph at the time of the purported service of summons on the Secretary of State was being sued in this action on an action based upon its intrastate business transacted by it in California. The term "transacted business" as used in the California Code sections above referred to and as defined as above set forth is in conformity with the interpretation of that

term almost uniformly made by the Appellate Courts of the State of California and the decisions of the Federal Courts.

When the Circuit Court of Appeals presented this question:

> "However, assuming such limitation, the question is what was the 'business' which the California legislature had in mind when it sought to protect California business men from acts, here continued acts, of foreign corporations committed in the state and creating a liability there before Triumph's departure from its jurisdiction."

the answer to the question was found in the California Civil Code, Section 405, above quoted and in the constant reiteration of the principle in all cases, state and federal, that the corporation actually involved must transact the business; that the corporation must be entering into repeated and successive transactions of its business other than interstate or foreign commerce, and that it must do some substantial part of its ordinary business in the state.

Eastman Kodak Co. v. Southern Photo Materials Co. (1927), 273 U. S. 359;

Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co. (E. D. Ky., 1931), 54 F. (2d) 107, 108;

Doe v. Springfield Boiler & Mfg. Co. (C.C.A. 9, 1900), 104 Fed. 684, 687;

Westor Theatres v. Warner Bros. Pictures (D. N. J., 1941), 41 F. Supp. 757, 762;

Seaboard Terminals Corporation v. Standard Oil Co. of New Jersey (S.D.N.Y., 1940), 35 F. Supp. 566, 568;

Lechler Laboratories v. Duart Mfg. Co. (S.D. N. Y., 1940), 35 F. Supp. 839, 840;

Adolph Meyer, Inc. v. Florists' Telegraph Delivery Ass'n (S.D.N.Y., 1936), 16 F. Supp. 783, 784;

Katz Drug Co. v. W. A. Sheaffer Pen Co. (W. D. Mo., 1932), 6 F. Supp. 210, 212;

Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corporation (C.C.A.-1, 1931), 46 F. (2d) 623;

Walton N. Moore Dry Goods Co. v. Commercial I. Co. (N. D. Cal., 1921), 276 Fed. 590, 593;

Knapp v. Bullock Tractor Co. (S. D. Cal., 1917), 242 Fed. 543, 550;

Estate of Wellings (1923), 192 Cal. 506, 513;

Davenport v. Superior Court (1920), 183 Cal. 506;

Conference Free Baptists v. Berkey (1909), 156 Cal. 466, 470;

The Thew Shovel Co. v. Superior Court (1939), 35 C. A. (2d) 183, 185;

McMillan Process Co. v. Brown (1939), 33 C. A. (2d) 279, 284, 91 P. (2d) 613;

Milbank v. Standard Motor Const. Co. (1933), 132 Cal. App. 67, 70;

W. W. Kimball Co. v. Read (1919), 43 Cal. App. 342, 345.

It is respectfully submitted that the liability sued on in this case, if any existed and if it occurred at

all, occurred a long time before the corporation engaged in transacting business within the meaning of the California law and is not a liability upon which it consented to be sued when it withdrew from business in 1943 in the State of California.

It is submitted further that the opinion of the Circuit Court of Appeals fails to give effect to the vital distinction between interstate business and intrastate business. The very essence of an anti-trust action is an attempted monopoly or restraint involving interstate commerce. No action arises under the anti-trust laws respecting monopolistic practices in intrastate commerce. Interstate business is expressly excluded by the California statute in its definition of "transacting business". (C. C., Sec. 405, "The term 'transacting intrastate business' * * * means entering into repeated and successive transactions of *its* business in this state, other than *interstate* or foreign commerce.") Without going into too great detail on this subject, it is respectfully urged by Triumph that the act of co-conspirators performed in the State of California could never be considered intrastate business within the meaning of the term "transacting business" as used in State and Federal statutes and as construed for the purpose of fixing venue. Triumph had no intrastate business in California. The conspiracy to which it is alleged it was a part was not a conspiracy relating to intrastate business. As well expressed by the Supreme Court of California:

> "It is thus apparent that it is not *any* activity of a corporation in a state other than that of its

> residence which will justify the conclusion that it is 'doing business' there, so as to make it amenable to process there, but it is the combination of local activities conducted by such foreign corporation—their manner, extent and character—which becomes determinative of the jurisdictional question."
>
> *West Publishing Co. v. Superior Court* (1942), 20 Cal. (2d) 720, 728 (Certiorari denied, 317 U. S. 700).

It is implicit, not only in the decisions cited by the Circuit Court of Appeals, but in all authorities in the United States, that "transacting business" means transacting business in the ordinary and usual sense, but above and beyond this, the entire subject of what constitutes "transacting business" in the State of California is set at rest by the statutory provisions of Section 405 of the Civil Code, to which, very respectfully, the Circuit Court of Appeals failed to advert.

With respect to the opinion of the Circuit Court of Appeals, the statement, relating to a period prior to the enactment of antimonopoly acts of the Federal and State Legislatures,

> "It was a usual business transaction to combine to attempt to destroy a competitor and secure a monopoly in the field of business of the combining group."

is nowhere borne out in the record, nor can the statement be sustained as a matter of judicial notice. Such combinations were wrongful and illegal long prior to

the enactment of the antimonopoly legislation. (36 Am. Jur. 481, Sec. 4.) Thus, parenthetically, it may be here noted that the present decision is the first decision in our judicial history which holds that a corporation may be sued in a district where a co-conspirator carried on some act in relation to a conspiracy.

The wrong here complained of sounds in "tort".

> "The remedy given by the Federal Anti-Trust Act authorizing an action for three-fold damages is a civil remedy for a private injury compensatory in its purpose and effect and sounding in *tort.*" (41 C. J. 187.) (Section 198, Monopolies.)

We do not find in the authorities a single case which holds that the commission of a tort in a district will give jurisdiction over a foreign corporation on the theory that the commission of a tort is transacting business within the meaning of the law. On the contrary, it would appear:

> "A foreign corporation is suable for torts committed in the domestic jurisdiction, if it is found therein in such a sense that process may lawfully be served upon it under the laws of the jurisdiction." (14A C. J. 1383.) (Section 4099, Corporations—Actions for Torts.)

We find no case in California which holds or in which it was contended that the commission of a tort constitutes transacting business in that jurisdiction; the contention that it did would be completely without merit under the applicable California law. (Sections 405, 406a, 411, Civil Code of California.)

C.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE ACTS OF AN ALLEGED CO-CONSPIRATOR OF TRIUMPH WITHIN THE NORTHERN DISTRICT OF CALIFORNIA CONSTITUTED TRANSACTING BUSINESS WITHIN THAT DISTRICT WITHIN THE MEANING OF THE CLAYTON ACT SO AS TO ESTABLISH VENUE OF A SUIT AGAINST AND TO CONFER JURISDICTION OVER TRIUMPH IN THAT DISTRICT ALTHOUGH IT DID NOT RESIDE IN THE DISTRICT, WAS NOT AN INHABITANT THEREOF AND OTHERWISE COULD NOT BE SAID TO BE FOUND OR HAVE AN AGENT OR TO TRANSACT BUSINESS THEREIN.

The Circuit Court of Appeals holds that the California members of the conspiracy were agents of Triumph to destroy plaintiff's business; that their acts were the acts of Triumph. The Circuit Court of Appeals recognizes that its decision in this respect is in conflict with the case of *Westor Theatres v. Warner Bros.* (D.N.J., 1941), 41 F. Supp. 757, 760, and it is further in conflict with *Mebco Realty Holding Co. v. Warner Bros. Pictures* (D.N.J., 1942), 45 F. Supp. 340, which followed the *Westor Theatres* case, supra; it is also in conflict with *Hansen Packing Co. v. Armour & Co.* (S.D.N.Y. 1936), 16 Fed. Supp. 784.

The Courts of the United States have held repeatedly that a corporation is not transacting business within a state by reason of acting through subsidiaries. It is essential that the corporation *itself* transact the business.

Consolidated Textile Corporation v. Gregory (1933), 289 U. S. 85;

Cannon Mfg. Co. v. Cudahy Packing Co. (1925), 267 U. S. 333;

People's Tobacco Co., Ltd. v. American Tobacco Co. (1918), 246 U. S. 79;

Peterson v. Chicago, Rock Island & Pacific R. Co. (1907), 205 U. S. 364;

Conley v. Mathieson Alkali Works (1903), 190 U. S. 406;

Bowles v. American Distilling Co. (S.D.N.Y., 1945), 62 F. Supp. 15;

Bergold v. Commercial Nat. Underwriters (D. Kans., 1945), 61 F. Supp. 639, 644;

Amtorg Trading Corporation v. Standard Oil Co. (S.D.N.Y., 1942), 47 F. Supp. 466;

Mebco Realty Holding Co. v. Warner Bros. Pictures (D.N.J., 1942), 45 F. Supp. 340;

Beneficial Industrial Loan Corporation v. Kline (N.D. Iowa, 1942), 45 F. Supp. 168;

Moorhead v. Curtis Pub. Co. (W.D. Ky., 1942), 43 F. Supp. 67;

American Fire Prevention Bureau v. Automatic S. Co. (S.D.N.Y., 1941), 42 F. Supp. 220;

Cordts v. Beneficial Loan Soc. (D.N.J., 1940), 34 F. Supp. 197;

75 *A. L. R.* 1242.

Section 407 of the California Civil Code provides in relevant part:

> "No foreign corporation need comply with the requirements of this chapter merely because a subsidiary corporation owned or controlled by it is engaged in the transaction of intrastate business in the state."

D.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT TRIUMPH TRANSACTED BUSINESS IN THE NORTHERN DISTRICT OF CALIFORNIA IN SUCH A SENSE AS TO ESTABLISH VENUE AND TO CONFER JURISDICTION OVER TRIUMPH.

The Circuit Court in its decision holds:

> "The continuing acts of the conspirators extending over six months, is as much business as if by agreement in violation of the anti-trust acts all the conspirators had consistently underbid appellant and by that wrongful method destroyed his business by preventing him from making any sales in California."

The continued acts referred to in the opinion are those set out in full in the petition on pages 4-6 and relate to causing an association to be organized, which association it is alleged requested manufacturers to blacklist the plaintiff.

This holding has been attacked elsewhere in this brief on various grounds. The particular vice of the holding in the instant case becomes even more apparent when tested by the actualities existing here: It abundantly appears in the case at bar that during the period of the alleged conspiracy Triumph had neither an office, a warehouse nor a bank account in California, "that the manner in which it conducted its business was to accept orders in Maryland and fill them from its Maryland plant and ship them to its customers in California, which customers, in turn, sent their money to Maryland." See affidavits of Trempy (R. 33) and Bell (R. 28).

It is clear that those transactions, i.e., making sales as above set forth, did not constitute "doing business" in the State of California. Refraining from making those sales is an act even more remote from the "doing of business." As neither the act of selling nor the act of refraining from selling constitutes "doing business", then conspiring to do them cannot change their character. It is clear, therefore, that a conspiracy not to sell cannot be an act of doing business when selling without conspiring is not such an act. The Circuit Court's holding to the contrary is not based on reason and is not good law.

The decision of the Circuit Court of Appeals is predicated mainly upon the decision of the Supreme Court in *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359, 373, and *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corporation* (C.C.A.-1, 1931), 46 F. (2d) 623, 625. The soundness of the position of Triumph in this case is clearly borne out in both of these decisions.

Neither this Court nor the Circuit Court in the cases cited above departs from the long-existing and general rule of what constitutes transacting business.

Facts which the Circuit Court of Appeals here held constitutes transacting business by petitioners.

1. It is a Maryland corporation.

2. Prior to December of 1938 it was, according to the allegations of the complaint, a member of a conspiracy to violate the anti-trust laws.

3. The conspirators, in 1936, caused to be organized an association of some defendants, none of whom are named or identified. This association passed a resolution resolving to contact "eastern manufacturers of fireworks for the purpose of preventing any further sale of fireworks to plaintiff", and did contact manufacturers requesting plaintiff be blacklisted during a six months' period in 1936.

Facts in the cases cited by the Circuit Court as authority for present holding.

In the case of *Eastman Co. v. Southern Photo Co.:*

"Eastman Kodak Co. had for many years prior to the institution of the suit, in a continuous course of business, carried on interstate trade with a large number of photographic dealers in Atlanta and other places in Georgia, to whom it sold and shipped photographic materials from New York. A large part of this business was obtained through its travelling salesmen who visited Georgia several times in each year and solicited orders from these dealers which were transmitted to its New York offices for acceptance or rejection. In furtherance of its business and to increase the demand for its goods, it also employed travelling 'demonstrators', who visited Georgia several times in each year, for the purpose of exhibiting and explaining the superiority of its goods to photographers and other users of photographic materials. And, although these demonstrators did not solicit orders for the defendant's goods, they took at times retail orders for them from such users, which they turned over to the local dealers supplied by the defend-

Facts in the cases cited by the Circuit Court as authority for present holding.

ant." (Supreme Court Reporter, pp. 370, 371.)

In the case of *Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corporation* (C.C.A. 1, 1931), 46 F. (2d) 623, 625:

"If a foreign manufacturing corporation has a well-defined plan of promoting the sale of its products among the several states, which involves contracts with so-called distributors located in each state over whose business it retains a general oversight and control under its contract, which distributor must appoint as many dealers in the cities and town located in the territory allotted to it as the manufacturer deems necessary, and at regular intervals it sends into a state a district manager, so called, whose duty it is to check up on the business done by a distributor and his dealers, and report thereon, to promote the sale of the manufacturer's products by demonstration, salesmanship talks, advice, the settling of disputes between distributors and dealers, or dealers and customers, and in addition the manufacturer issues with each unit of its product sold or authorizes its distributor or local dealer to issue a warranty against defective parts and

Facts in the cases cited by the Circuit Court as authority for present holding.

inferior workmanship, we think it is clearly transacting business within the meaning of section 12 of the Clayton Act (15 USCA Section 22) sufficient to establish a venue in a district where such acts are due."

The Court will further note that the Eastman Company case, supra, and the Jeffrey-Nichols Motor Co. case, supra, were based upon a plain violation of the Clayton Act but that each was, nevertheless, decided without any reference to the theory advanced by the Circuit Court here. In other words, the matter of transacting business was considered solely in relation to what the corporations (themselves) did in their ordinary course of business. This is clearly pointed out in the *Jeffrey-Nichols Motor Co.* case, supra, as follows:

> "'A corporation is engaged in transacting business in a district, within the meaning of this section (section 12), in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process—if in fact, in the *ordinary and usual sense,* it 'transacts business therein of any substantial character,' Eastman Co. v. Southern Photo Co., supra."

The foregoing rule of law is even more accurately stated by the Supreme Court of the United States in

People's Tobacco Co. v. American Tobacco Co. (1918), 246 U. S. 79, as follows:

> "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted. Phila. & Reading R.R. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; St. Louis Southwestern R.R. Co. v. Alexander, 227 U. S. 218, 226, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77."

A holding that a foreign corporation which merely caused other corporations to form an association in a particular state, which association performed some act relating to the blacklisting of a plaintiff, has transacted business of such a nature and character as to warrant the inference that it has subjected itself to the local jurisdiction, flies in the teeth of every decision of the state and federal courts of the United States.

The language "transact business" has had almost uniform interpretation. It must be assumed that when Congress used the words "transact business" it was using that term to express the meaning which the Courts of the United States have given it prior to the enactment of the statute.

E.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE ALLEGED CO-CONSPIRATORS OF TRIUMPH WERE ITS AGENTS WITHIN THE MEANING OF THE CLAYTON ACT.

It is respectfully submitted that the type of relation between conspirators, one with the other, is not the type of *agency* referred to in the Clayton Act. The *agency* contemplated in the Clayton Act is an agency in the ordinary acceptation of the word; namely, the power to carry on and transact the business of its principal.

Eastman Kodak Co. v. Southern Photo Materials Co. (1927), 273 U. S. 359;

Lumiere v. Mae Edna Wilder, Inc. (1932), 261 U. S. 174, 178;

Bowles v. American Distilling Co. (S.D.N.Y., 1945), 62 F. Supp. 15, 18;

Mebco Realty Holding Co. v. Warner Bros. Pictures (D.N.J., 1942), 45 F. Supp. 340.

There is nothing in the law that gives this defendant any preferential right to sue under the Clayton Act. It was not the intention of Congress to give jurisdiction against every conspirator. *It must be borne in mind that when Congress passed the Clayton Act, it was dealing with this precise subject. It had the power, if it so chose, to give jurisdiction over all conspirators to any district where any one conspirator was found, or resided, or where any act of the conspiracy was done. Instead of that, it clearly provided that action may be brought only in the judicial dis-*

trict where defendant is an inhabitant, or in any other district where it may found or was transacting business.

F.

THE IMPORTANCE OF THE QUESTIONS INVOLVED.

The present decision is the first decision in our judicial history which holds that a corporation may be sued in a district where a co-conspirator carried on some act in relation to a conspiracy.

Under the decision of the Circuit Court of Appeals any corporation or individual would thereunder be subject to the jurisdiction of any District Court if it is a member of a conspiracy and one of the conspirators happens to be a resident of the state where the action is brought. Thus, an isolated small dealer in Massachusetts, whether corporate or individual, could be compelled to come to California to defend a lawsuit if he was party to an agreement in restraint of trade where another signer of the same agreement happened to reside in California.

To fully grasp the scope of the departure from the accepted rules in relation to agency and what constitutes transacting business, the most careful consideration must be given to the language of plaintiff's complaint, upon which the Circuit Court bases its decision. It is alleged that the defendants, one of whom is Triumph, "caused to be organized an association of those defendants which are sued herein under their

true names as had Pacific coast establishments." This defendant did not have a Pacific coast establishment. As a matter of fact, the complaint is barren of any allegation as to which corporations did have Pacific coast establishments. However, the action of this association is the basis of the assumption that Triumph came into the State of California and enjoyed the benefits and protections of the laws of that state and therefore must assume the responsibilities arising from such protection. Such finespun reasoning should not be indulged in to deprive a defendant of a fundamental right, forever recognized in our judicial history, that a defendant is to be subject to suit and process in the place of his residence. The doctrine which finds expression in the Court's recent decision of *International Shoe Company v. State of Washington* (Dec. 1945), 326 U. S. 310, finds no place in the instant case. Here, there is not the slightest indication that the defendant intended to accept the benefits or protections of the laws of the State of California. Having enjoyed no benefits or protections from the laws of the State of California, can it be said that the foreign corporation acquired any obligations? We have read with care the decisions of this Court where certain minimum contacts within a state may be such that the maintenance of suit does not offend "traditional notions of fair play and substantial justice." The facts in none are comparable to the case at bar. Here a single defendant residing in Maryland is called upon to defend and respond in damages in a law suit where eight other defendants, if the charge

is true, are equally liable and where the proof of the association between the parties, if any, would naturally flow from the testimony and corporate records of a group of defendants, all, save one, in the eastern zone of the United States. Further, the transaction is one where the occurrences involved happened six to nine years before the filing of the complaint.

The determination of the issue presented in this appeal in favor of Triumph does not destroy the right of the respondent to maintain his suit. He has the right to sue and maintain his action against Triumph in the State of Maryland.

For the foregoing reasons, it is respectfully submitted that the writ should issue.

Dated, San Francisco, California,
October 18, 1946.

HAROLD C. FAULKNER,
ROBERT BEALE,
Attorneys for Petitioner.

GREGORY, HUNT, MELVIN & FAULKNER,
Of Counsel for Petitioner.

(Appendix Follows.)

Appendix

UNITED STATES CODE SECTIONS CITED.

Title 15, *United States Code*, Sec. 15:

"15. *Suits by persons injured; amount of recovery.* Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws *may sue* therefor in any district court of the United States in the district in which the *defendant resides* or *is found* or *has an agent,* without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.) (Italics ours.)

Title 15, *United States Code*, Sec. 22:

"22. *District in which to sue corporation.* Any suit, action, or proceeding under the antitrust laws against a corporation *may be brought* not only in the judicial district whereof *it is an inhabitant,* but also in any district wherein it *may be found* or *transacts* business; and *all process* in such cases may be served in the district of which it is an *inhabitant,* or wherever *it may be found.*" (Oct. 15, 1914, c. 323, Sec. 12, 38 Stat. 736.) (Italics ours.)

CALIFORNIA STATUTES CITED.

Civil Code, Sec. 406a:

"Sec. 406a. (*Service of Process.*) Process directed to any foreign corporation may be served upon such corporation by delivering a copy to

the person designated as its agent for service of process or authorized to receive service of process, or to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the general manager in this State, or the cashier or assistant cashier of a bank. In the event that no agent so designated can be found with due diligence at the address given, or if the agent so designated be no longer authorized to act, or if no person has been designated and if no one of the foregoing officers or agents of the corporation can be found after diligent search, then service shall be made by delivery to the Secretary of State or to an assistant or deputy Secretary of State. A copy of such designation, certified by the Secretary of State, is sufficient evidence of the appointment of such agent for the service of process. The making and filing of an affidavit or affidavits in the action or proceeding showing what effort was made or action taken to comply with the above requirements of due diligence or diligent search, and the making of an order of the court in which said action or proceeding is pending finding that due diligence or diligent search has been exercised and directing service of summons as herein provided, shall be sufficient proof of the fact of such exercise of due diligence or diligent search.

Notice by telegraph. If the corporation to be served has not filed with the Secretary of State the statement required by section 405, there shall be delivered to the Secretary of State by the person desiring to make such service a statement of the address of such corporation to which notice, and a copy of such process, shall be sent. Upon

receipt of such process and fee the Secretary of State forthwith shall give notice to the corporation by telegraph, charges prepaid, both to its principal or home office and to its principal office in the State, of the service of such process and shall forward to each of such offices by registered mail, a copy of such process. If he have no record of such corporation or such offices, then such notice shall be telegraphed and such copy shall be mailed to the corporation at the address given in the statement delivered to the Secretary of State at the time of such service. The corporation shall appear and answer within thirty days after delivery of such process to the Secretary of State. The certificate of the Secretary of State, under his official seal, of such service shall be competent and sufficient proof thereof. The Secretary of State shall keep a record of all process served upon him and shall record therein the time of such service and his action in respect thereto.

Corporations that have withdrawn. A foreign corporation which has transacted intrastate business in this State and has thereafter withdrawn from business in this State may be served with process in the manner provided in this section in any action brought in this State arising out of such business, whether or not it has ever complied with the requirements of section 405, Civil Code. (Added by Stats. 1931, p. 1832; Am. Stats. 1933, p. 1418; Stats. 1937, p. 486.)"

Civil Code, Sec. 407:

"Sec. 407. *Exemptions from application of chapter.* The requirements of this chapter as to

foreign corporations shall not apply to corporations engaged solely in interstate or foreign commerce.

No foreign corporation need comply with the requirements of this chapter merely because a subsidiary corporation owned or controlled by it is engaged in the transaction of intrastate business in the state. (Added by Stats. 1905, p. 631; Am. Stats. 1929, p. 1289; Superseded by Stats. 1931, p. 1762; Added by Stats. 1931, p. 1833.)"

Civil Code, Sec. 411:

"Sec. 411. *Surrender of right to transact intrastate business.* A foreign corporation which has qualified to transact business in this State may surrender its right to engage in such business within this State by filing in the office of the Secretary of State a certificate executed and acknowledged by its president or vice-president and secretary or treasurer, setting forth:

(1) That it surrenders its authority to transact intrastate business in this State.

(2) That it consents that process against it in any action upon any liability or obligation incurred within this State prior to the filing of the certificate of withdrawal may be served upon the Secretary of State.

(3) A post office address to which the Secretary of State may mail a copy of any process against such corporation that may be served upon him.

The surrender of authority to transact business in this State shall not affect any action pending at the time. The mere retirement from trans-

acting business within this State without filing a certificate of withdrawal shall not revoke the appointment of any agent upon whom process may be served within this State. (Added by Stats. 1929, p. 1290; Superseded by Stats. 1931, p. 1762; Added by Stats. 1931, p. 1834; Am. Stats. 1933, p. 1419.)"

Subject Index

Table of Authorities Cited

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 632

TRIUMPH EXPLOSIVES, INC., formerly known as and sued herein as TRIUMPH FUSEE & FIREWORKS COMPANY, LTD. (a Maryland corporation),

Petitioner,

vs.

OSCAR GIUSTI,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Ninth Circuit.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals, filed and entered on June 27, 1946, appears in the record (R. 106) and is reported at 156 F(2d) 351 under the title, Giusti v. Pyrotechnic Industries, Inc., a corp., et al.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of the above entitled Court under Sec. 347 of Title 28 of the United States Code.

QUESTIONS INVOLVED.

The real issues involved are:

(1) Was petitioner "found" through a "finding by consent" for jurisdiction purposes in the instant action?

(2) Did petitioner's withdrawal from California operate to revoke such consent?

STATUTES INVOLVED.

A.

Section 15 of Title 15 of the United States Code provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is *found* or has an agent. without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Italics ours.)

Section 22 of Title 15 of the United States Code provides:

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be *found* or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be *found.*" (Italics ours.)

B.

The pertinent sections of the Civil Code of California, as far as material, provide:

Sec. 411. "Surrender of right to transact intrastate business. A foreign corporation which has qualified to transact business in this state may surrender its right to engage in such business within this state by filing in the office of the Secretary of State a certificate executed and acknowledged by its president or vice-president and secretary or treasurer, setting forth:

(1) That it surrenders its authority to transact intrastate business in this state.

(2) That it consents that process against it in any action upon any liability or obligation incurred within this state prior to the filing of the Certificate of Withdrawal may be served upon the Secretary of State.

(3) A Post Office address to which the Secretary of State may mail a copy of any process against such corporation that may be served upon him.

The surrender of authority to transact business in this state shall not affect any action pending at the time. The mere retirement from transacting business within this state without filing a

certificate of withdrawal shall not revoke the appointment of any agent upon whom process may be served within this state."

Sec. 406(a) (Last paragraph thereof) *"Corporations that have withdrawn.* A foreign corporation which has transacted intrastate business in this state and has thereafter withdrawn from business in this state may be served with process in the manner provided in this section in any action brought in this state arising out of such business, whether or not it has ever complied with the requirements of Section 405, Civil Code." (Sec. 405 specifies certain prerequisites for admission included in which is the requirement that a written designation of agent and copy of its charter be filed.)

The word "liability" as used in Section 411 applies to actions sounding in tort as well as for breach of contract.

Tingley v. Times-Mirror Co., 144 Cal. 205;
Miller & Lux v. Kern Co. L. Co., 134 Cal. 586.

SIMILAR STATUTES.

A.

Section 51 of the Judicial Code (28 U.S.C. 112), provides as far as pertinent:

"* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the

jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant; except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found."

B.

Sec. 216, Subd. 1, par. E, of the New York Statutes, respecting the withdrawal of foreign corporations, provides:

"That it consents that process against it in an action, or proceeding upon any liability or obligation incurred within this state before the filing of the certificate of surrender of authority, after the filing thereof, may be served upon the Secretary of State."

THE FACTS OF THE CASE.

Respondent filed an action in the United States District Court at San Francisco against petitioner, a corporation organized under the laws of the State of Maryland, and sued herein as Triumph Fusee & Fireworks Company, Ltd. (R. 12-13), and other named fireworks manufacturers on November 13, 1944 (R. 12) under 15 U.S.C. 15 (Anti-Trust Law) to recover

damages for injury to the wholesale fireworks merchandise business, which he had been engaged in at said place, resulting from (1) a conspiracy between petitioner and other defendants to destroy said business and (2) the overt acts alleged to have been done pursuant thereto.

It is admitted that a copy of the summons and complaint herein was delivered to the Secretary of State of the State of California on December 8, 1944. (R. 46-47.) The delivery thereof constituted service of process herein upon petitioner as prescribed by California Civil Code, Section 406(a).

Liquid Veneer Corp. v. Smuckler (CCA 9), 90 F. (2d) 196;

Union Pac. Co. v. Novak (CCA 9), 61 F. 573.

On March 7, 1945, petitioner appeared specially in a motion to (1) quash the summons, and (2) quash the service thereof. In an affidavit (R. 15) by one of the attorneys for petitioner, which was served and filed on said day (R. 19), it was stated (1) that at the time of the delivery of the said copies to the Secretary of State on December 8, 1944, said corporation was not doing business in California, (2) that petitioner qualified to do business therein on January 2, 1940, and thereafter did, on December 7, 1943, file a withdrawal certificate with said Secretary of State pursuant to California Civil Code, Section 411, and since said time has not transacted business therein, intrastate or otherwise. It concluded with a wherefore paragraph which repeated the prayer thereto-

fore made in the motion and asked in addition that the action as to petitioner be dismissed.

Said motion came on regularly for hearing on March 26, 1945 (R. 45 and Docket Entries R. 95), at which time respondent filed two counter affidavits, one made by him, the other by his counsel. (R. 45, 19, 23.) Facts stated in said affidavit were in conflict with those stated in petitioner's said affidavit. Consequently there was thus raised the question of whether petitioner was also transacting its business in California prior to the day on which petitioner filed its qualifying papers in California, to wit, January 2, 1940, and as early as the year 1935. (R. 59, 54-57.)

At the hearing one witness testified orally. (R. 66.) He was called by respondent and testified that Kindel & Graham (1058 Mission Street, San Francisco, California), of which he is a partner, commenced in the spring of 1938 to do business with the petitioner by placing an order with petitioner which was filled by direct shipment from petitioner's plant in Maryland to San Francisco (R. 67), and that subsequently, in 1938, petitioner opened a warehouse in Oakland (R. 67), from which place orders, thereafter taken in San Francisco, were filled. (R. 68.) Subsequently three additional affidavits were filed by petitioner. (R. 83, 26, 28, 31.) One of them, the affidavit of Mary Bell averred in effect that she conducted her fireworks business at Culver City, California, under the name of Culver City Fireworks Company; that she did not solicit any business in the name of petitioner or act for it in any capacity; that the full extent of her con-

nection with petitioner prior to the spring of 1939 was in that, from 1934 and earlier and up to and through 1938, she, acting for Culver, sent orders for fireworks to Triumph at its Maryland office, and said orders were filled from said place and sent to Culver in California, and Culver paid, upon Triumph's factory terms, by sending its check to Triumph to its office in Maryland. (R. 30.) Her affidavit was in response primarily to that portion of respondent's affidavit (R. 23-26) which recited facts, to wit, that respondent had written to petitioner on April 20, 1935 for information and prices covering its products and had received the following reply thereto from petitioner's president:

"Elkton, Maryland
April 23rd, 1935

Dear Mr. Giusti:

I want to assure you that our line is not only the best finished line on the market, but also unsurpassed as to quality. We are making some exclusive items which have proven to be very ready and profitable sellers, and inasmuch as it is too late for direct shipment from here to your City, I would advise you to communicate with the Culver City Fireworks Company, Culver City, Cal., who handle our line exclusively, and they will be very glad to take care of anything you may want.

I make a trip to the Pacific Coast once a year, and will not fail to look you up next October or November.

Very truly yours,
/s/ J. B. Decker"

and that on May 23, 1935, affiant received the following Western Union Telegraph message from said Mary Bell, owner of Culver City Fireworks Company, to wit:

> "Best Discount off triumph catalogue is thirty per cent FOB Culver City."

At the conclusion of said hearing, the said motion was ordered submitted. (R. 88, 44.) On June 19, 1945, the trial Court made and entered its order quashing service of summons and dismissing this action as to petitioner. (R. 88-89.)

On September 5, 1945, notice of appeal from said order was filed by respondent.

Said order is appealable.

28 U.S.C. 225;

In re Melekov (CCA 9), 114 F. (2d) 727;

Wisconsin Co. v. Western Fire Co. (CCA 7), 107 F. (2d) 402.

ARGUMENT.

PETITIONER WAS "FOUND" IN THE FORUM AT THE TIME WHEN SUMMONS AND COMPLAINT WAS SERVED ON THE SECRETARY OF STATE, AND PETITIONER WAS THEREFORE AMENABLE TO THE PROCESS OF THE LOWER COURT IN THIS ACTION UNDER 15 U.S.C. 22.

I.

PETITIONER CONSENTED TO BE "FOUND" IN CALIFORNIA WHEN IT COMPLIED WITH THE CALIFORNIA STATUTE GOVERNING THE ADMISSION OF FOREIGN CORPORATIONS.

Petitioner's argument is quite unsound. The fallacy of it lies in the fact that petitioner has deliberately eliminated or disregarded a very important element in the facts of the case. The missing fact is that petitioner filed the necessary papers with the Secretary of State (California) to qualify it to conduct its business in said state. This missing fact together with the character of the bulk of the cases cited by it to support its argument is indicative of petitioner's attitude toward the decision in *Nierbo v. Bethlehem Corp.*, 308 U.S. 165, 60 Sup. Ct. 153, 84 L. Ed. 167. Petitioner is evidently not yet willing to accept the law as laid down in said decision. When it is ready to accept the law as there laid down, petitioner will know that there is a vast difference between a "finding through consent" and "a finding through doing business."

Petitioner, by appointing an agent for the service of process in compliance with California Civil Code 405, thereby consented to be sued in California upon transitory causes of action.

Nierbo v. Bethlehem Corp., 308 U.S. 165.

Such consent applies to actions in the Federal Courts as well as those in State Courts and to actions therein which are based on Federal law.

Oklahoma Packing Co. v. Oklahoma Gas & Elec., 100 Fed. (2d) 770 (approved in the *Nierbo* case, supra).

The fact that petitioner was "found" in California, satisfied the jurisdictional requirement, notwithstanding the "finding" was procured by said consent.

Ex parte Schollenberger, 96 U.S. 369, 377, 24 L. Ed. 853 (also approved in the *Nierbo* case, supra).

The essential thing is the finding, beyond which the Court will not ordinarily look.

Ex parte Schollenberger, supra.

It thus appears that the numerous authorities cited in petitioner's brief, which specify the amount of business which shall be done in the invaded state in order to constitute "doing business" are wholly irrelevant to the facts before us.

While it is true that the Court, in the *Nierbo* case, dealt only with the word "found" as used in Sec. 51 of the Judicial Code, supra, the decision, nevertheless, applies with equal force to the word "found" as used in 15 U.S.C. 22, supra. If there appears to be any doubt about it we need only to examine the authorities which relate to it. But, before doing so, we desire to digress momentarily to ascertain, for introductory purposes only, what difference, if any, exists, between the two statutes referred to, when the factual

situation shows no attempt on the part of the foreign corporation to meet the statutory requirements of the invaded state.

In 1914, Congress relieved the injured person from the requirement that he sue only in the district where the foreign corporation defendant resides or is found, by requiring merely that said corporation transact business there of some degree or character less than that of "doing business". To constitute "transacting business" it is not essential that agents be sent into the forum to act for the foreign corporation. It is sufficient if goods are shipped into the state upon orders which originate solely through a mail correspondence, from retail customers.

Jeffrey Co. v. Hupp Motor Co. (CCA 1), 46 F. (2d) 623, reversing 41 F. (2d) 767.

In the *Jeffrey* case the Court said, at page 624:

> "Prior to the enactment of October 15, 1914, c. 323, Sec. 12, 38 Stat. 736 (15 USCA Sec. 22), a person or corporation violating the anti-trust laws could only be sued in the district where resident, or where found. The provision of section 12 of the Clayton Act relieved 'the injured person from the necessity of resorting for the redress of wrongs committed by a nonresident corporation, to a district, however distant, in which it resides or may be found'—often an insuperable obstacle—and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business, and bring it before the court by the service of process in a district in which it re-

sides or may be 'found'." *Eastman Co. v. Southern Photo Co.,* 273 U.S. 359, 373, 374, 47 S. Ct. 400, 403, 71 L. Ed. 684; *Gen. Inv. Co. v. Lake Shore Rwy.,* 260 U. S. 261, 279, 43 S. Ct. 106, 67 L. Ed. 244.

'A corporation is engaged in transacting business in a district, within the meaning of this section (section 22), in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is "found" therein and is amenable to local process—if in fact, in the ordinary and usual sense, it "transacts business" therein of any substantial character.' *Eastman Co. v. Southern Photo Co.,* supra."

We now return to the construction given to the word "found".

The right of action given by Section 15 of Title 15 U.S. Code, is an action at law, and is maintainable only if resulting actual damage to business or property takes place.

Gibbs v. McNeeley (CCA 9), 102 F. 594;
Noyes v. Parsons (CCA 9), 245 F. 689;
Northwestern Oil Co. v. Socony Co. (CCA 7), 138 F. (2d) 967.

To determine the meaning of the word "found" contained in Section 22 supra, the Court will resort to the decisions construing Section 51 of the Judicial Code (supra).

Michigan Alum. Co. v. Alum. Casting Co. (CCA 6), 190 F. 879.

Thus it appears that the definition of the word "found" is exactly the same in each instance. The *Nierbo* case is thus applicable to both statutes. Petitioner therefore is required to meet the decision in the *Nierbo* case squarely. No opportunity for avoiding it is present.

II.

PETITIONER'S "WITHDRAWAL" FROM CALIFORNIA DID NOT OPERATE TO REVOKE THE CONSENT TO BE "FOUND" THERE FOR THE PURPOSE OF THE INSTANT ACTION.

At this point it is well to remind ourselves of the rule now firmly established that where "consent to be found" has been thus given, the Court will not ordinarily interest itself in the amount or character of business either then or thereafter done by the foreign corporation in the state where such qualifying occurred. By doing so, we more readily perceive that the only possible cause which would exist for examining into the character of the business of petitioner would be that which appears by reason of the wording of the California statutes governing the "withdrawal" of foreign corporations.

California Civil Code Section 411, supra, requires the filing of a written statement by petitioner. This was done. (R. 18.) Paragraph (2) of said section provides:

> "That it consents that process against it in any action upon any liability or obligation incurred within this state prior to the filing of the Certificate of Withdrawal may be served upon the Secretary of State."

The word "liability" as used in Section 411 applies to actions sounding in tort as well as for breach of contract.

Tingley v. Times-Mirror Co., 144 Cal. 205;
Miller & Lux v. Kern Co. L. Co., 134 Cal. 586.

The cause of action in the case at bar is based upon a tort,

Truax v. Corrigan (CCA 9), 257 U.S. 312,

the actual damage from which is the gist of the cause of action.

Mox, Inc. v. Woods, 202 Cal. 675;
Thew Shovel Co. v. Superior Court, 35 C. A. (2d) 183;
Liquid Veneer Corp. v. Smuckler (CCA 9), 90 F. (2d) 196;
United States v. Pan American Pet. Co. (CCA 9), 55 F. (2d) 753, 758;
15 *C. J. S.* 1041.

Where a foreign corporation complies with Statutes 1917, p. 371, stating the conditions under which a foreign corporation may do business in that state, one of which conditions is that, in the event of a withdrawal from the state, service of process can be made on the officer provided by statute, these conditions are to be read into all the contracts.

Western Grocer Co. v. N. Y. Overseas Co. (D.C. Cal.), 296 F. 269;
Cohen v. Industrial Finance Corp. (D.C. N.Y.), 44 F. Supp. 489 (Nov. 1944), affirmed 144 F. (2d) 379.

In the *Cohen* case, a Virginia corporation, in 1936, surrendered authority to do business in New York and filed a certificate of withdrawal consenting that process against it in an action on obligation incurred within the state before filing of certificate might be served on Secretary of State, stockholder's derivative action for accounting with regard to alleged fraudulent and illegal transactions between the corporation and others which had taken place prior to 1936 was based on an "obligation incurred within the State" prior to 1936 so that service of process on the corporation by service upon the Secretary of State of New York was valid.

Thorne v. Grand (1941), 277 N.Y. 212, 14 N.E. (2d) 42,

to the same effect, sets out the New York statute thus:

Sec. 216, subd. 1, paragraph E, provides in respect to the certificates of a foreign corporation surrendering its authority to do business in the state:

> "That it consents that process against it in an action, or proceeding upon any liability or obligation incurred within this state before the filing of the certificate of surrender of authority, after the filing thereof, may be served upon the Secretary of State."

There a majority stockholder of a foreign corporation defendant allegedly used corporate funds of said defendant for his own benefit and wrongfully diverted assets to the use of himself and others. The Court held the cause of action an "obligation" within the statute.

Druckerman v. Barbord, 22 N.Y.S. (2d) 595;
Lessauer v. Brown, 26 N.Y.S. (2d) 722.

Turning now to the allegations of the complaint in the instant case, which contains but one cause of action, anyone can readily see from the merest cursory examination that it states, matters, in addition to others, as follows:

That petitioner is engaged in the manufacture and sale of fireworks (R. 4-6); that at all times mentioned in this complaint, the defendant (including petitioner) in the course and conduct of their respective businesses made various and numerous shipments of fireworks to jobbers and other customers in the several states of the United States. (Mary Bell's affidavit, R. 30, shows that petitioner's shipments to customers in California began before the year 1934 and continued up to and through 1938 and until the warehouse was established in California. Attention is also invited to the testimony of Clarence Grayhan, R. 67); that defendants entered into agreements and conspiracy for the purpose of eliminating competition in the jobbing and retail sales of fireworks in trade and commerce between, among, in and with the several states in the year 1935; that plaintiff was at all of the times mentioned in the complaint prior to August 1, 1938 engaged in a wholesale distribution fireworks business at San Francisco, California. (R. 7.) That plaintiff is a resident of the forum. (R. 3, par. 2.) That plaintiff was at all of said times assisted by his wife in the operation of said business; that said wife was familiar with every detail thereof; and assumed the actual management of same and carried on said business for plaintiff on those occasions when plain-

tiff was away from San Francisco interviewing his out-of-town customers, and during the time of plaintiff's disability hereinafter alleged (R. 7); that the conspiracy was being effectuated as early as January, 1936 (R. 6, par. VIII); that other overt acts were performed between January 15, 1936, and January 1, 1938, to effect the object of the conspiracy. (R. 7, par. IX.)

The overt acts alleged (R. 7-9, par. IX), "procured promises and agreements", are of such character that their effect was a *continuing* one. Promises and agreements procured on January 1, 1938, for instance, would most likely produce a continuous devastating effect for a considerable time, a period of time impossible even to approximate. Because of them respondent was unable to replenish his stock of goods. He was unable to purchase any fireworks for said business. (R. 10, par. XI.) Respondent did not have knowledge of the conspiracy or any of the reasons for the refusal to sell goods to him or for the cutting off of his credit. (R. 10, par. XII.) On January 10, 1936, respondent became mentally ill (insane) and his said wife was obliged to and did thereafter manage his said business until the said business was obliged to be closed and terminated because of stock depletion and inability to make further purchases of merchandise. (R. 11, par. XIII.) It was closed on August 1, 1938, while respondent was still under said mental disability and respondent did not recover from said disability until his release from the insane asylum on or about January 8, 1943. (R. 11, par. XIII.)

At this point in this brief, we believe it appropriate to pause momentarily to refer to a collateral matter appearing in petitioner's brief.

There appears in the record, but not as an exhibit in evidence in the case, because of the trial Court's failure to rule upon the objection interposed to petitioner's offer of the same in evidence (R. 87), the Court clerk's file in a prior action filed against petitioner herein on behalf of this respondent. This file is a part of the record herein as a consequence of a stipulation entered into by counsel. (R. 92.) The said prior action was dismissed by the District Court upon the day it received the following letter:

"May 20, 1940

Hon. Lauderback
U.S. Federal District Court
San Francisco, California

Dear Sir:

I am writing regarding Civil Suit No. 21191-L title, Giusti versus Pyrotechnic.

This suit has been on file for the past year and no interest taken by my attorneys.

I, Oscar Giusti, a citizen and plaintiff to the above entitled action, petition the Court that I wish to withdraw the above case from any further hearing, providing it remains free from prejudice to either side, and with the privilege of reopening it at some future date.

Sincerely yours,
Oscar Giusti."

Petitioner has in its petition (p. 7) and in its brief (p. 18, through adoption by reference) referred to said action apparently for the sole purpose of endeavoring to prejudice this Court into questioning or prejudging the allegations respecting respondent's insanity contained in the complaint. This file is no more relevant or material to the questions of law raised herein than would have been a similar offer on the part of respondent to have the attorneys who represented respondent in the filing of said action testify that they did not realize at the time of the filing of said action that plaintiff was not sane and that it was not until he was subsequently, by jury, declared insane that they realized what plaintiff's actual mental condition was at the time that they were so acting in his behalf and to further testify that at the time of said dismissal said attorneys were arranging with their opponent for a meeting to discuss terms of settlement of said action and had not the slightest knowledge of plaintiff's intention to write such a letter or of any dissatisfaction whatsoever on his part with reference to their services to him in said action. While we may be accused of improper conduct because of having used this comparison, nevertheless we believe we are justified in so doing in order to combat the prejudice which petitioner has thus attempted to create.

Having asserted ourselves with reference to that which we choose to designate as petitioner's collateral attack, we now refer back to the credit impairment resulting from the acts alleged in the complaint.

It is a matter of common knowledge that credit thus impaired is not easily reestablished even though the wrongful act has ceased. The impairment spreads to the most remote parts of the business world. For how many years the credit injury to respondent will continue is beyond conjecture.

The injuries to respondent therefore continued for a much longer time than petitioner would have us believe; much longer than August 1, 1938, the day it is alleged (R. 11) when respondent lost his business because of inability to make further purchases. The impairment to his credit and the refusal of petitioner, by virtue of the aforesaid agreements and conspiracies, to sell to him, was not removed on August 1, 1938, as petitioner would have us believe. Nor is there anything in the entire record to support the statement of petitioner (Pet. 8) that the conspiracy "terminated some time prior to December 1938" or that the time when petitioner's warehouse was established in California, on or about May 1, 1939, was "some time after the termination of the conspiracy". There is nothing in the record to show that the conspiracy was not in full force and effect at the time of the filing of the complaint in this action. There is nothing in the record which shows that petitioner was not engaged in absolutely the same illegal method of conducting its fireworks business after, as well as before, the time it complied with the California statutes which required it to designate a California agent for purposes of suit therein. On the contrary, the allegations of the complaint plainly indicate that the method of

doing business continued to be exactly the same after as well as before said time. (Petitioner should be reminded to correct its statement of facts in the comparison table set forth in its brief (page 37) in this respect as well as by amplifying the facts there stated so as to correspond to those shown by the record.)

Moving now to a consideration of the relation which this destruction of respondent's credit bore to the petitioner's business of manufacturing and selling fireworks, we make these deductions.

For petitioner to say that its refusal to sell to respondent, illegal though it was, did not contribute to the method, plan, operation and value of petitioner's business, would be too preposterous to be worthy of belief. No business concern would entertain such a business method unless such scheme resulted in added profits to its business. Because the illegal refusal to sell or extend credit enhanced the value of petitioner's business, the said plan or scheme was a part and parcel of and was directly connected with said business.

Thus it is to be observed (1) that the cause of action was not only a "liability and obligation incurred" within this state prior to the filing of the certificate of withdrawal, but also (2) a cause of action which "arose out of" the business which petitioner was conducting in California both before and after it filed its said designation of agent for suit purposes therein.

III.

PETITIONER'S AUTHORITIES DISTINGUISHED.

Petitioner argues that the last paragraph of Section 406(a) of the California Civil Code, supra, is a limitation upon Section 411(2) and, after quoting a passage from *Tucker v. Cave Springs Mining Corp.*, 139 C. A. 213, 217, states quite arbitrarily and with no authority to support the statement, that (Brief p. 23):

> "The history of the enactment of these sections demonstrates the express intent of the legislature to confine suits to intrastate business."

This statement is wholly without support of any kind and is nothing more than the figment of the imagination of the author.

When the *Tucker* case was decided, the last paragraph of 406(a), supra, had not as yet been enacted.

The last paragraph of Section 406(a), did not as stated by petitioner come into existence in 1933. It did not exist prior to 1937 (Cal. Stats. 1937, p. 486), which time is long after the time when the *Tucker* case was decided, nor was it in existence when Judge Hollzer decided *Miner v. United Airlines* (1936 D. C. Cal.), 16 F. Sup. 930, a case relied upon by petitioner in the Circuit Court of Appeals, and concerning which we will presently have more to say.

Tucker v. Cave Springs, 139 C. A. 213, was decided in 1934. It therefore does not hold, as petitioner implies, that 406(a) is a limitation upon Civil Code Section 411. Nor is any authority cited by petitioner,

and we know of none existing, to support his said bare assertion.

Now referring again to *Miner v. United Airlines,* supra, we observe that it was decided long before *Nierbo v. Bethlehem,* supra, wherein the United States Supreme Court overruled, at least indirectly, if not directly, the federal cases upon which Judge Hollzer based his decision. That it was decided long before *Nierbo v. Bethlehem,* is a statement which is also applicable to *Jameson v. Simond Saw,* 2 Cal. App. 582, 586, another case relied on by petitioner in the Circuit Court. Not only is the *Miner* case, supra, directly contrary to the law reaffirmed in *Nierbo v. Bethlehem,* supra, but it likewise conflicts with *Baltimore & O. R. Co. v. Harris,* supra, upon which the *Nierbo* case placed the stamp of approval and in which there was much less factual reason for holding the claim there involved to be "connected with or part of the business transacted" in the District of Columbia, than there was under the very similar claim with which Judge Hollzer was confronted in the *United Airlines* case. The *Miner* case, therefore, is not helpful to us. The *Jameson* case, supra, and *Davenport v. Superior Court,* 183 Cal. 506, as well as the other cases cited on page 14 of the petition herein, are also of no value because the section 411 there in question is not the section 411 with which we are here confronted. The subject matter of the one is entirely different from the subject matter of the other. None of these cases therefore can be used as a guide in the present one

excepting possibly to the limited extent that some of them reassert the rule that when the State Court has not already spoken that the rules of construction as laid down by the United States Supreme Court should control.

Since the California Supreme Court has not as yet spoken with reference to the construction to be placed upon California Civil Code Sections 411(2) or the last paragraph of 406(a), the law proclaimed in the *Nierbo* case, supra, should control, at least up to the time of petitioner's withdrawal from California and that the New York cases, hereinbefore cited by us, should, because of the similarity of the New York statute to our Section 411 (2), be followed in determining whether under Section 411 (2) the instant claim is "a liability or obligation incurred within" California. We believe therefore that Section 406(a) should be construed by this Court, not as a limitation upon Section 411 as applied to the facts presently before us, but as legislation which created new rights only, viz., a right to sue (after defendant foreign corporation's withdrawal) where said corporation had violated Section 405 in never having complied therewith. That such was the intention of the legislature in enacting the *last* paragraph of Section 406(a) is we believe, plainly implied in the paragraph in Section 406 which precedes it. (Pet. Brf. Appx. p. ii.)

We will now devote a moment to the initial paragraph under subtitle E of petitioner's argument (Brf. p. 41). Petitioner there states:

> "It is respectfully submitted that the type of relation between conspirators, one with the other, is not the type of *agency* referred to in the Clayton Act."

Nothing which appears in the decision of the Circuit Court gives any basis for said statement. Petitioner by making it, again shows that it has wholly misconceived the effect of the decision in the *Nierbo* case, supra. It does not, apparently, grasp the point that jurisdiction here is founded solely upon a "finding through consent" and not upon a "finding through 'doing business' ".

The theatre cases, referred to under subtitle "C" of petitioner's argument (Brf. p. 33) were cited by petitioner in the Circuit Court and discussed in the opinion of the said Court. They are distinguishable from the facts in the instant case as follows:

Westor Theatres v. Warner Brothers, 41 F. Supp. 757, differs from the instant case in that, in the former, there was no "finding by consent" and no business, other than the alleged conspiracy, was ever alleged or otherwise shown to have been done in the State of New Jersey where the action was brought. *Hanson v. Armour,* 16 F. Sup. 784, differs from the instant case in that the defendant Armour appeared generally instead of specially and attacked the sufficiency of the allegations of the complaint instead of moving to quash service of process. There was no affidavits submitted to substantiate the "finding through 'doing business' " claim and/or to supple-

ment the allegations of the complaint thereon. The Court there said at page 786:

> "The plaintiff alleges that the New Jersey Corporation is doing business in this district, but has pleaded no facts, and submitted no affidavits to substantiate the allegations. Furthermore, the defendant denies the allegation, and in an affidavit filed in support of the motion to dismiss, specifically avers in some detail that the New Jersey Corporation transacts no business here."

It is also interesting to note that the two cases cited by petitioner as aforesaid conflict even with one another. In the *Warner Brothers* case the Court said, page 761, without citing any authority in support thereof:

> "Although the phrase 'transacting business' has never been defined, one fundamental principle seems to be recognized. The acts done and which amount to transacting business must constitute some substantial part of the ordinary business of the corporation and must be continuous or at least of some duration."

This statement is directly opposed to the rule established by *Eastman Co. v. Southern Photo,* supra, as hereinbefore shown, but also as stated in the *Hanson* case. There the Court said at page 786:

> "The Delaware corporation contends that since it did only 2.49 per cent of its business in New York * * *, it has not 'transacted business' here. This small percentage, however, amounted to $4,000,000 and is simply a commentary on the defendant's size."

Thereupon the Court in the *Hanson* case proceeded to quote with approval the rule laid down in the *Eastman* case, supra.

The remainder of the cases cited by petitioner under his subtitle "C" also have no bearing upon the instant case. Since the factual situation before us shows without question that petitioner was "found" by a "finding through consent", the question of whether the "doing of business" was done through subsidiaries or in any other manner whatsoever, does not enter the picture. That question is wholly irrelevant. Nor did the Circuit Court as much as intimate that the jurisdiction was founded upon anything other than consent. That portion of the opinion which dealt with the liability of the principal for the acts of its agent was limited solely to the liability of petitioner for the damages sustained by respondent. That portion of the opinion was directed solely to replying to petitioner's contention that the damage to respondent was not a "liability incurred" in California on the part of petitioner.

The decision thereon is in keeping with well established principles of law.

McCandless v. Furlaud, 296 U.S. 140, 80 L. Ed. 121;

15 *C. J. S.* p. 1028, Sec. 18.

Having thus found that petitioner was liable for the acts of its agent in effecting the object of the conspiracy by damaging respondent as aforesaid, it remained only for the Court to examine the record to

ascertain whether petitioner had consented to be "found" in California. It is clear, therefore, that the opinion does not violate the rule that a "finding through doing business" (as distinguished from a "finding through consent") cannot be established solely by evidence that a subsidiary of defendant foreign corporation was doing the business in the forum.

It is quite evident, therefore, that the opinion of the Circuit Court is in all respects correct and entirely in accord with the law enunciated by this Court in the *Nierbo* case, supra.

CONCLUSION.

It is respectfully submitted that petitioner has failed utterly to make any showing which would entitle it to invoke the jurisdiction of this Court and its petition, therefore, should be denied.

Dated, San Francisco, California,
November 15, 1946.

Respectfully submitted,
CHELLIS M. CARPENTER,
Attorney for Respondent.